

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 522 of 1992

with

C.R.A. Nos. 523 of 1992, 524 of 1992

with

CIVIL APPLICATION NOS. 3364 of 1997, 3031 of 1997 and
2477 of 1997 in C.R.A. No. 522 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE N.N.MATHUR

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1. Whether Reporters of Local Papers may be allowed
to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy
of the judgement?
4. Whether this case involves a substantial question
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?
1 to 5 - No

AMEE COSMOS PHARMA LTD

Versus

ASIT CONSULTANTS,

Appearance:

C.R.A. 522/92, 523/92 AND 524/92

MR ASHWIN L SHAH for Petitioner

MS VASUBEN P SHAH with Ms. K.J. Brahmhatt

for Respondent No. 1

MR. B.J. SHELAT with Mr. B.S. Trivedi for respondent

MR. PRANAV G. DESAI for respondent

C.A. No. 2477 of 1997, 3031 of 1997 in CRA No. 522/92

MR. R.D. Dave for petitioner

MR ASHWIN L SHAH for respondent

MS VASUBEN P SHAH with Ms. K.J. Brahmbhatt
for Respondent No. 1
MR. B.J. SHELAT with Mr. B.S. Trivedi for respondent
MR. PRANAV G. DESAI for respondent

C.A. No. 3364 of 1997 in CRA No. 522 of 1992

MR. ASHWIN L. SHAH for petitioner
MS VASUBEN P SHAH with Ms. K.J. Brahmbhatt
for Respondent No. 1
MR. B.J. SHELAT with Mr. B.S. Trivedi for respondent
MR. PRANAV G. DESAI for respondent

CORAM : MR.JUSTICE N.N.MATHUR

Date of decision: 02/04/98

COMMON ORAL JUDGEMENT

These three Civil Revision Applications and the connected Civil Applications are being disposed of by this common order as they arise from Civil Suit No. 2730 of 1989 pending in the City Civil Court, Ahmedabad.

Facts: The petitioner Ameer Cosmo Pharma Limited, original defendant No. 1, is registered under the provisions of the Companies Act, 1956 and carries on its business of manufacturing life saving drugs including drugs for curing cancer. The company claims to be the owner of the office premises bearing No. G-8 to G-11 in the building known as Amola Chambers situated at C.G. Road, Navrangpura, Ahmedabad. The company is using the said premises for office purpose.

2. M/s. Asit Consultants, the original plaintiff claims to be in the management and administration of the properties of Amola Chambers. They are organising and managing the affairs relating to allotment of office premises/shops constructed in the said building and also managing and administering the office relating to transfer of shares, allotment of shares including financial aspect in respect of the said building.

3. Original defendant No. 2, Andhra Bank, advanced facilities to Ameer Cosmo Pharma Limited (hereinafter referred to as "the Company"). The said Company created equitable mortgage of the shop No. G-8 to G-11 in favour of Andhra Bank. The Company is said to be in debt to Andhra Bank to huge amount which is said to be approximately Rs. 2 crores. Thus, Andhra Bank filed a Civil Suit being No. 6780 of 1988 for recovery of Rs. 51,20,966.34p in the year 1988 in the City Civil Court, Ahmedabad. In the said suit the plaintiff Andhra Bank

also sought enforcement of mortgage by decree of sale of the said property of Amola Chambers. Andhra Bank took out Notice of Motion for injunction against transfer, assignment of the properties of the Company. The City Civil Court ordered the company to maintain status quo with respect to suit property. The said order dated 7.1.1989 is operative till today. Suit No. 6780 of 1989 has been transferred to Debt Recovery Tribunal, (Gujarat State) at Ahmedabad, under the provisions of Recovery Debts due to Banker and Financial Institution Act, 1993. The said Tribunal is seized of the said matter.

4. M/s. Asit Consultants filed a Suit No. 2730 of 1989 for permanent injunction restraining Amee Cosmo Pharma Ltd. defendant No. 1 from disturbing its actual physical possession of G-8 to G-11 situated in Amola Chambers. M/s. Asit Consultants claimed actual and physical possession of G-8 to G-11 allotted and purchased by the Company. According to M/s. Asit Consultants all that the Company paid a sum of Rs. 12,49,250/- by way of deposit towards consideration for the said shops. The company failed and neglected to pay the balance amount of consideration of Rs. 1,37,000/-. The plaintiff also alleged that the Company neglected to pay amount of municipal tax which amounted to a sum of Rs. 2,20,000/-. Andhra Bank having come to know about the filing of the said suit made an application for being impleaded as a party in the suit. The said application was allowed and the bank was impleaded as defendant No. 2.

5. During the trial of the suit it was realized that the Company was not in a position to pay the debt of the bank and dues of the M/s. Asit Consultants and therefore by a tripartite agreement between M/s. Asit Consultants, Amee Cosmo Pharma Ltd. and Andhra Bank was entered into and the purshis in that regard dated 24.1.1991 Exh. 135 was submitted before the court. By the said agreement the bank defendant No. 2 was authorised to call offer for the purchase of the said office premises. Defendant No. 1 was also given right to bring such offer and the offers were required to be submitted before the court. After due consideration thereof in the presence of all the parties the question that any of the offers should be accepted or not and if to be accepted which one should be accepted was to be decided. It was also agreed between parties that the entire procedure shall be completed within three months from 24.1.1991 being the date of compromise. For the convenience, English translation of the contents of the purshis is reproduced below:-

"Defendant No. 2 Bank has to invite offers for

the sale of the offices No. 8 to 11 being the suit offices in the possession of the defendant No. 1 and in that defendant No. 1 is also entitled to bring the offers. While inviting the said offers, defendant No. 2 Bank has not to make a mention of the name of defendant No. 1 or plaintiff. After receiving the said offers the question whether the said offers should be accepted or not is to be decided after producing the same before the Hon'ble Court and discussing the same in the presence of the parties. This procedure is to be completed within three months from today.

2. If it is decided to accept the offer of the highest amount out of the offers received, then the said shops are to be given to the offerer giving the highest offer and out of the amount received, defendant No. 2 Bank has to pay the first Rs. 1,50,000/- Rupees one lac and fifty thousand only to plaintiff and thereafter, the amount of the municipal tax will be paid and the amount remaining thereafter is to be credited to the amount of the suit claim in Civil Suit No. 6780 of 1988 filed by defendant No. 2 against defendant No. 1 of this suit.
3. As soon as the offerer pays the full amount, plaintiff has to admit such person or his nominee as the member of Jaini Offices Owners Association as per the rules of the Association and plaintiff has to give adjustment in the name of the person giving the highest offer and/or the person becoming the member of the Association for the all the amounts paid by defendant No. 1 to plaintiff and also for the amount of Rs. 1,37,000/- Rupees one lac and thirty seven thousand only out of the amount of Rs. 1,50,000/paid by defendant No. 2 to plaintiff and at that time, after passing a resolution in the meeting of the Board of Directors of defendant No. 1, defendant No. 1 shall give consent for the transfer of the said amount to the name of the person becoming member and defendant No. 1 shall give the actual possession of the said shops to the new member without any dispute and without any delay.
4. Plaintiff and defendant No. 1 shall give co-operation of all type to the highest offerer and the person paying the amount as decided for

becoming the member of Jaini Offices Owners Association.

5. Thus, after the person taking the said shops becomes a member of Jaini Association and after plaintiff gives the adjustment in Jaini Offices Owners Association, the account between the plaintiff and defendant No. 1 shall be deemed to have been settled.

6. Plaintiff and defendant No. 1 give an undertaking to act as per this agreement and the parties agree that if plaintiff or defendant No. 1 fail to act accordingly, then the Hon'ble Court will be entitled to commence legal proceedings against the defaulter treating him as having committed a breach of the said undertaking.

sd/-

Ahmedabad For Asit Consultant, Ahmedabad
Date: 24.1.1991 -----

sd/- For Ameer Cosmo Pharma Ltd.
Adv. for plff. sd/-

6. As per the agreement a sum of Rs. 50,000/- was paid to M/s. Asit Consultants by the Company. According to the Company Rs. 50,000/- was deposited under purshis Exh. 150 dated 25.10.1991 on which no objection was written by the counsel for the plaintiff. An offer of M/s. Shashi Trading Company was received for an amount of Rs. 18 lakhs in all with furnitures and fixtures. It is not necessary to go in further details, as the said offer ultimately did not work. Thereafter, another offer from M/s. S. Jayantilal & Co. through defendant No. 1 Company was received for an amount of Rs. 18,25,000/-. The said Company deposited Rs. 4,52,250/- as 25% of the offer amount on 17.3.1992 and remaining amount of Rs. 13,68,750/- by cheque drawn on National Co-operative Bank Ltd. on 12.3.1992. At this stage the Company submitted an application Exh. 163 wherein it was submitted that on expiry of three months after the order passed in Exh. 135 it has become ineffective and cannot be acted upon. It was contended that the time was the essence of the contract and on expiry of three months period there remains nothing and the agreement has become ineffective and inoperative. The learned City Civil Judge rejected the contention saying that the defendant No. 1 has participated in the proceedings for sale of the premises after the period of three months and therefore by his own

subsequent conduct he is estopped from raising such plea. The learned Judge also found that the defendant No. 1 and defendant No. 2 have taken active interest in the matter and as such now defendant No. 1 cannot challenge the proceedings and say that the order passed below Exh. 135, a tripartite agreement entered into between the parties was ineffective and inoperative by efflux of time. The court also found that defendant No. 1 is utilising dialectic tactics to delay the handing over possession to the purchaser and causing financial losses to them. In the opinion of the learned judge the application Exh. 163 has been filed with a mala fide intention. In view of this, the learned judge by order dated 10.4.1992 dismissed the application Exh. 163 with cost of Rs. 500/-.

7. Being aggrieved with the said order the Company preferred a revision application to this court which has been registered as Civil Revision Application No. 522 of 1992. At the admission stage of the said revision application this Court passed a consensus order dated 7.5.1992 which reads as follows:-

"Coram: C.K. THAKKAR, J

ORAL ORDER:

S.O. to 22.6.1992 p.h.

In the facts and circumstances of the case, it would be in the interest of justice if at this stage following directions are issued without prejudice to the rights and contentions of the parties:

- (1) The petitioner will pay an amount of Rs. 1,00,000/- to the first respondent-Ori. plaintiff with interest at the rate of 15% from December 15, 1991 on or before May 15, 1992.
- (2) The petitioner will get municipal valuation appeals disposed of at the earliest. The petitioner will pay the amount of Rs. 4.25 lacs to respondent No. 1 plaintiff on or before May 15, 1992.

The respondent No. 1 will pay the said amount or any part thereof as may be necessary for the payment of the said Tax immediately on intimation from the petitioner. In case the amount of municipal tax is more than Rs. 4.25 lacs, the petitioner will make payment of such excess

amount. If the amount is less the respondent No. 1 will pay the balance amount after payment of tax to the respondent No. 2 Bank within 7 days and respondent No. 2 Bank will credit the said amount towards its claim against the petitioner.

- (3) The petitioner will pay an amount of Rs. 10,00,000/- to the Second respondent Bank within six weeks from today with interest at the rate of 12% which shall be credited by respondent No. 2 Bank against its alleged dues against the petitioner being the subject matter of the Suit No. 6780/88 pending in Ahmedabad City Civil Court.
- (5) The petitioner will reimburse the respondent No. 2 Bank the expenses of the advertisement and expenses for filing Municipal Appeals within one week from today.
- (6) The petitioner will pay interest to respondent No. 3 S. Jayantilal & Co. at the rate of 15% on the amount of Rs. 18.25 lacs deposited by respondent No. 3 M/s. S. Jayantilal & Co. in the City Civil Court from the date of deposit. The petitioner will also pay the interest at the rate of 15% on the amount of Rs. 71,469/deposited with respondent No. 1 plaintiff. Such payment will be made on or before May 15, 1992.
- (7) The petitioner will file an undertaking to comply with the above condition on or before May 15, 1992.
- (8) On receipt of the amount of Rs. 1,00,000/with interest at the rate of 15% from the petitioner, respondent No. 1 plaintiff will admit the petitioner as a Member of Jaini Offices Association and issue share certificate in the name of the petitioner and deliver them the same immediately. The respondent No. 1 will file an undertaking to that effect on or before May 15, 1992.
- (9) Respondent No. 1 plaintiff will return the amount of Rs. 71,469/- to respondent No. 3 S. Jayantilal & Co. deposited by him with it by way of maintenance deposit immediately on or before May 20, 1992.

(10) The respondent No. 2 Bank is at liberty to withdraw Rs. 50,000/- deposited by the petitioner in this court pursuant to the order passed by this court and credit the same in the account of the petitioner. The office is directed to pay the said amount immediately to respondent No. 2.

(11) Respondent No. 2 Bank will release the property in question from mortgage in its favour on payment of the above amount on or before June 30, 1992.

(12) Respondent NO. 3 M/s. S. Jayantilal & Co. is permitted to withdraw the amount of Rs. 18.25 lacs deposited by it and lying in the City Civil Court in Civil Suit No. 2730 of 1989.

(13) Registrar of the City Civil Court, Ahmedabad is directed to make payment of Rs. 18.25 lacs to the respondent No. 3 M/s. S. Jayantilal & Co. on or before May 15, 1992. Ad-interim relief is ordered to be continued. Liberty to respondent No. 3 to effect service of this order to the Registrar.

Liberty to apply.

7.5.1992 Sd/- (C.K. Thakkar, J)"

8. It appears that the said interim order was passed keeping in view that there was an offer for the subject premises to the tune of Rs. 18.25 lacs. Though at the stage of purshis Exh. 135 was served, the Company was interested in selling property to raise the finance but after the rejection of application Exh. 163 the Company became interested in keeping the subject premises and to make the payment. Thus, the court by interim arrangement directed to pay a sum of Rs. 1,00,000 with interest at the rate of 15% from December 15, 1991 to the original plaintiff. The court also directed for making efforts to dispose of municipal valuation appeal and the amount to be paid by the Company to the plaintiff. The Company was also to pay a sum of Rs. 4,50,000/- and Rs. 10,00,000/with interest at the rate of 12% to the defendant No. 2 Bank. M/s. Jayantilal and Co. was also permitted to withdraw the amount of Rs. 18.25 lacs. The defendant No. 1 Company after making compliance to certain extent, made application 3364 of 1997 and prayed that a direction may be given to the bank to release four shops in question and to issue a no-objection certificate

for the proposed sale of the said shops and also to issue a letter to the Registrar of Companies, Gujarat for the said release after receipt of the balance amount as per the order of the court. So far as the payment to the original plaintiff is concerned, there appears to be no dispute. However, there is some dispute with respect to the dates of payment made to defendant No. 2. According to the petitioner a sum of Rs. 4,25,000/- has been paid to the bank on 7.5.1992. This fact is not being disputed. Similarly, there is no dispute with respect to deposit of Rs. 2.5 lakhs on 18.8.1992 and another deposit of Rs. 2.50 lakhs except with variation of date. The say of the Company is that out of Rs. 10 lakhs payable under paragraph 4 of the order of the court, a sum of Rs. 5,50,000/- has been paid. So far as the balance of Rs. 4,25,000/- is concerned, it is stated as per para 2 of the order excess amount after payment of tax was to be paid to the respondent No. 2 Bank to be credited towards claim of the bank. The say of the Company is that a sum of Rs. 38,820/- was paid against the tax and balance amount of Rs. 3,86,180/- has been paid to the bank. Thus, only a sum of Rs. 1,13,820/- is payable. The Company has also agreed to pay the said balance to the Bank at the time it releases the said shop from its charge. However, the say of the bank is that a sum of Rs. 3,86,180/- cannot be taken as payment against clause (4) of the order of this court dated 7.5.1992. A sum of Rs. 10 lakhs was required to be paid within six weeks from the date of the order with interest at the rate of 12%. The payment of Rs. 3,86,180/- is independent under para 2 of the order. It is further stated that the payment has not been made within the stipulated period. In view of this, the Company cannot insist for the enforcement of para 11 i.e. to release of the property in question from mortgage.

9. It is contended by Mr. Shah that the interim order of this court dated 7.5.1992 created certain rights and obligations on the parties. The Company has discharged its obligation by making the payment to the plaintiff Asit Consultants. The municipal tax has also been paid. The other payments as contained in different paras of the order so far as the plaintiff is concerned has been complied with. It is not in dispute that the plaintiff has no further interest in the matter now. So far as the bank is concerned Mr. Shah submits that as per their calculation except a sum of Rs. 1,13,820/- the entire amount has been paid and the Company is prepared to make the said payment as well on discharging the obligation by the bank by releasing the property under mortgage. Mr. Shah further submits that the Company is

even prepared to pay higher sum if on proper calculation the same is found to be payable. It is therefore submitted that there is an obligation on the bank to release the property in question in view of para 11 of the order. On the other hand Mr. Shelat, learned counsel submits that the Company has not complied with the order of this court. He has invited my attention to para 11 of the order which reads as under.

"The respondent bank will release the property in question from mortgage in its favour on payment of the above amount on or before June 30, 1992."

10. Mr. Shelat submits that the property could be released if the entire payment is made before 30.6.1992. Pointing out the conduct of the Company it is submitted that the application was made for extension of time which has been registered as Civil Application No. 2288 of 1992. The said application was filed on 19.6.1992 but no extension was granted by this court and the application was ultimately rejected on 7.12.1993. Therefore, in absence of any extension the Company cannot press for release of the property in question from mortgage. In my view the amount of Rs. 3,86,180/- has been paid to the bank under para 2 of the order which is independent of payment of Rs. 10 lakhs under para 4 of the order. In view of this, it is wrong to say that balance is of only Rs. 1,18,820/-. The Bank is right in saying that balance is above Rs. 4,50,000/-. As the Company has failed to make payment of the said amount on or before 30.6.1992, the Bank cannot be compelled to release the property. In view of this, I find no merit in Civil Application No. 3364 of 1997 and the Civil application is accordingly rejected.

11 Referring to Civil Revision Application No. 522 of 1992 Mr. Shah, learned counsel appearing for the petitioner has raised two contentions. It is firstly contended that the time is the essence of contract. As per order Exh. 135 was to be made and finalised within the period of three months. Since that has not been done, the compromise Exh. 135 has become non-operative. In my view there is no substance in this contention. A reading of Exh. 135 clearly shows that the agreement is still subsisting. In my view even if there is any offer today, the same can be still considered. The petitioner cannot be permitted to take advantage of its own wrong. Initially the Company was interested in selling property but subsequently it has changed its mind and he has created obstruction in settling the offer. In view of this, I find no substance in the first contention raised

by Mr. Shah and the same is accordingly rejected.

12. It is next contended that there is escalation of price of the property under mortgage during the period 1992 to 1998. Now it can fetch an amount no less than Rs. 40 lakhs and therefore it would not be prudent to sell the property at throw away price of Rs. 18.50 lakhs. Thus, according to Mr. Shah any discussion on Exh. 135 has become academic. I agree with Mr. Shah so far as not to settle the matter at the offer given by S. Jayantilal and Co. In fact S. Jayantilal and Company has withdrawn the amount of Rs. 18.25 lakhs with interest as per the order of this court dated 7.5.1992. Therefore, that offer is not subsisting. Still new offers can be called and the same can be considered. Thus, in my opinion there is no substance in the second contention raised by Mr. Shah. In view of this, I do not find any merit in Civil Revision Application No. 522 of 1992.

So far as Civil Revision Application Nos. 523 of 1992 and 524 of 1992 are concerned, they do not survive for the reasons that I have upheld the order passed below Exh. 163. Civil applications Nos. 3031 of 1997, 3364 of 1997 and 2477 of 1997 filed by third parties cannot be entertained as they have no locus standi. In view of the aforesaid, Civil Revision Application Nos. 522 of 1992, 523 of 1992 and 524 of 1992 are rejected and all the connected Civil Applications are also rejected.

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